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August 23, 2006

**By Electronic Mail**

Lawrence H. Norton, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

**Re: Supplemental Comments on Advisory Opinion Request 2006-20 (Unity 08)**

Dear Mr. Norton:

These supplemental comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to AOR 2006-20, an advisory opinion request filed by Unity 08. We previously submitted comments on this request on June 19, 2006, within the normal 10-day comment period for AO requests.

In a draft opinion that was on the agenda for the Commission's July 20, 2006 meeting, the general counsel correctly concluded "that Unity 08 must register as a political committee and therefore is subject to the reporting requirements and limitations and prohibitions of the Act." Agenda Doc. 06-50, Draft Ad. Op. 2006-20 (July 13, 2006) at 1. The general counsel's analysis and conclusion are consistent with the earlier comments we submitted. The Commission, however, deferred consideration of the counsel's draft until its meeting on August 29, 2006.

On August 16, 2006, Unity 08 filed an extensive supplement to its AOR (hereinafter "AOR Supplement"). The AOR Supplement changes nothing with respect to the general counsel's correct conclusion that Unity 08 must register as a political committee and comply with the rules that apply to federal political committees. We are filing these supplemental comments, however, to explicitly address new arguments raised by Unity 08 in its AOR Supplement.<sup>1</sup>

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<sup>1</sup> The Commission was originally set to consider this matter at its meeting on July 20, 2006. The deferral of the matter was apparently prompted by another submission made by Unity 08 on July 19, 2006 in response to the general counsel's draft opinion. The July 19 submission substantially overlaps with the August 16 submission, and we direct our supplemental comments to the latter, more recent submission by Unity 08.

**I. AOR Supplement “Point I” raises issues about political party status that are entirely irrelevant to the determination of Unity 08’s political committee status.**

In “Point I” of its AOR Supplement, Unity 08 asserts that “The fundamental difficulty with the question posed is that FECA and its corresponding regulations were not designed to deal with an organization, like Unity 08, that is not yet a party and does not yet have a candidate, but may nominate a candidate in the future.” AOR Supplement at 5. In fact, FECA and its corresponding regulations were designed *precisely* to deal with organizations like Unity 08 — organizations raising and spending money to influence federal elections.

Specifically, Section 431(4) of Title 2 defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). A “contribution,” in turn, is defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(8)(A). And an “expenditure” is defined as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(9)(A).

Unity 08 states in its original AOR, in its AOR Supplement, and on its Web site, that its *primary goal* is to elect a Unity Ticket for President and Vice President in 2008. Unity 08’s Web site, for example, states that “Unity08 is a citizens’ movement to get our country back on track by nominating and electing a Unity Ticket in the ‘08 presidential election to promote leadership, not partisanship. Every day — with your support — we’re making progress toward this goal.”<sup>2</sup> The phrase “with your support” is a hyperlink to Unity 08’s donation page.

FECA’s definition of “political committee,” on its face, applies to organizations like Unity 08, which are raising and spending funds for the purpose of influencing federal elections (e.g., “electing a Unity Ticket in the ‘08 presidential election”).<sup>3</sup> Despite Unity 08’s suggestion to the contrary, AOR Supplement at 5, the FECA definition of “political committee” is clearly not limited to candidate and party organizations. Indeed, the Commission’s statistics indicate

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<sup>2</sup> Unity 08 Web site home page (<http://www.unity08.com>) (visited August 18, 2006); *see also* AOR at 2 (“*Goal One* is to elect a Unity Ticket for President and Vice-President of the United States in 2008....”) (emphasis in original); and AOR Supplement at 2 (“*Goal One* is to elect a ticket for President and Vice-President of the United States....”) (emphasis in original).

<sup>3</sup> The Supreme Court in *Buckley* construed the statutory definition of “political committee” as applicable only to organizations with the “major purpose” of influencing federal elections precisely because the plain meaning of the bare statutory language applied broadly to all organizations raising and spending funds to influence federal elections. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). As discussed below, Unity 08 has a “major purpose” of influencing federal elections and, consequently, falls within the scope of the definition, both on its face and as narrowed by the *Buckley* Court.

that 4,343 non-candidate, non-party organizations were registered as federal political committees in 2005 and raised more than \$477 million in the off election year.<sup>4</sup>

Unity 08 attempts to obfuscate the facially clear application of the statutory definition of “political committee” with a lengthy discussion of federal law treatment of *political parties*. See AOR Supplement at 5–8. Yet Unity 08 readily and correctly acknowledges that it is not a “political party.” See AOR Supplement at 6. FECA defines the term “political party” to mean “an association, committee, or organization which nominates a candidate for election to any Federal office *whose name appears on the election ballot* as the candidate of such association, committee, or organization.” 2 U.S.C. § 431(16) (emphasis added). Unity 08 will not become a political party unless and until it meets the statutory and regulatory requirements relating to party candidate ballot status, etc. For this reason, Unity 08’s lengthy discussion of the law as it pertains to that subset of political committees which are political parties is both premature and irrelevant to the question at hand — whether Unity 08 is simply a “political committee.”

**II. Contrary to AOR Supplement “Point II,” the *Buckley* Court made clear that the statutory term “expenditure” is not limited to “express advocacy” as applied to “major purpose” organizations such as Unity 08.**

Unity 08 begins “Point II” of its AOR Supplement by incorrectly asserting that the Supreme Court in *Buckley* narrowly construed the term “expenditure” to include “only funds used for communications that expressly advocate[] the election or defeat of a clearly identified candidate,” AOR Supplement at 8–9 (quoting *Buckley*, 424 U.S. at 79–80), as applied to any “organizations other than candidates or candidate controlled political committees,” AOR Supplement at 8.

This is a mischaracterization of the *Buckley* opinion. The line drawn by the Court for purposes of remedying constitutional vagueness of the statutory term “political committee,” and the underlying term “expenditure,” was not between “candidate controlled” committees and all other organizations. Instead, the Court construed the term “political committee” to “encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*” *Buckley*, 424 U.S. at 79 (emphasis added).

Whereas Unity 08 claims it is only making “expenditures” if it engages in “express advocacy,” the *Buckley* Court found the statutory definition of “expenditure” — funds spent “for the purpose of influencing” an election — to be constitutional as applied to candidate committees and any other organizations “*the major purpose of which is the nomination or election of a candidate.*” Unity 08 in its Supplemental AOR ignores the Court’s reference to “major purpose” organizations.

Specifically, the *Buckley* Court reasoned that “political committees” — construed in *Buckley* to “only encompass organizations ... the major purpose of which is the nomination or election of a candidate” — are not vulnerable to concerns of vagueness in drawing a line between issue discussion and electioneering activities because their activities “can be assumed to

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<sup>4</sup> See FEC, “Summary of PAC Financial Activity Through December 31 of the Off Election Year,” available at <http://www.fec.gov/press/press2006/20060308pac/pac2005.pdf>.

fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Buckley*, 424 U.S. at 79.

By contrast, the Court developed and applied the “express advocacy” test only as a limiting construction on the definition of “expenditure” for spenders *other than* “major purpose” groups:

But when the maker of the expenditure is not within these categories — *when it is an individual other than a candidate or a group other than a “political committee”* — the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe “expenditure” for purposes of that section in the same way we construed the terms of [the spending limit] — to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

*Buckley*, 424 at 79–80 (emphasis added).

The Court in *Buckley* thus made a crucial distinction ignored by Unity 08 in its AOR Supplement: when the spender is an organization with a “major purpose” to influence candidate elections, the statutory definition of “expenditure” as spending “for the purpose of influencing” a federal election is sufficiently clear to be facially constitutional, because the activities of such organizations “are, by definition, campaign related” and its spending “can be assumed” to fall within the area properly regulated by Congress. Therefore, there is no need for an “express advocacy” limitation on the definition of “expenditure” in order to save the term from vagueness.

By contrast, when the spender is any other kind of organization — any organization which does *not* have a “major purpose” to influence elections — then a narrowing construction of “expenditure” as limited to express advocacy is required in order to avoid constitutional problems of vagueness.

The Court affirmed this analysis in *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003), where it cited and quoted the same language from *Buckley* in rejecting a vagueness challenge to the “promote, support, attack or oppose” standard in BCRA as applied to political party committees.

For this reason, the “express advocacy” test of *Buckley*, which the Supreme Court subsequently deemed to be “functionally meaningless,” *McConnell*, 540 U.S. at 218, is not relevant to the question of whether a “major purpose” organization (such as Unity 08) is spending money to influence the election of federal candidates, and whether it is, accordingly, making “expenditures.” As explained below and in our June 19, 2006 comments, Unity 08 is a “major purpose” organization and any disbursements made by Unity 08 “for the purpose of influencing” federal elections are “expenditures” under FECA.

**III. Contrary to AOR Supplement “Point III,” Unity 08’s “major purpose” is the nomination or election of a candidate to federal office.**

As explained above, the Supreme Court in *Buckley* construed the term “political committee” to “encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*” 424 U.S. at 79 (emphasis added). In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court again invoked the “major purpose” test and noted that if a group’s independent spending activities “become so extensive that *the organization’s major purpose may be regarded as campaign activity*, the corporation would be classified as a political committee.” 479 U.S. at 262 (emphasis added). In that instance, the Court said the group would become subject to the “obligations and restrictions applicable to those groups *whose primary objective is to influence political campaigns.*” *Id.* (emphasis added). The Court in *McConnell* restated the “major purpose” test for political committee status as iterated in *Buckley*. 540 U.S. at 170 n.64.

Thus, Unity 08 is a “political committee” under 2 U.S.C. § 431(4) if it meets both parts of a two-prong test for political committee status: (1) it has a “major purpose” to influence elections and (2) it receives \$1,000 in contributions or makes \$1,000 in expenditures.

The general counsel draft opinion correctly states that “[a]n organization’s ‘major purpose’ may be established through its own public statements[.]” Draft Ad. Op. 2006–20 at 8, and found that “Unity 08 satisfies the major purpose test.” *Id.* Indeed, Unity 08 makes clear in a multitude of ways that its “major purpose” is to nominate and elect candidates for President and Vice President in the 2008 election. Unity 08’s Web site home page states prominently that “Unity08 is a citizens’ movement to get our country back on track *by nominating and electing a Unity Ticket in the ‘08 presidential election* to promote leadership, not partisanship.”<sup>5</sup> Similarly, Unity 08 stated in its AOR that “Goal One is to elect a Unity Ticket for President and Vice-President of the United States in 2008....” AOR at 2 (emphasis in original). And Unity 08 reiterated in its AOR Supplement that “Goal One is to elect a ticket for President and Vice-President of the United States....” AOR Supplement at 2 (emphasis in original).

Given these statements, it can hardly be contested that Unity 08 is a group “the major purpose of which is the nomination or election of a candidate,” as set forth by the Court in *Buckley*.

This conclusion is buttressed by the fact that Unity 08 has registered with the Internal Revenue Service under section 527 of the Internal Revenue Code as a “political organization” that is operated “primarily” for the purpose of “accepting contributions or making expenditures” under 26 U.S.C. § 527. AOR at 1.

Section 527 of the IRC provides tax exempt treatment for “exempt function” income received by any “political organization.” The statute defines “political organization” to mean a “party, committee, association, fund, or other organization (whether or not incorporated) *organized and operated primarily for the purpose of directly or indirectly accepting*

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<sup>5</sup> Unity 08 Web site home page (<http://www.unity08.com>) (visited August 18, 2006) (emphasis added).

*contributions or making expenditures, or both, for an exempt function.”* 26 U.S.C. § 527(e)(1) (emphasis added). An “exempt function” is defined to mean the “function of *influencing or attempting to influence the selection, nomination, election, or appointment of any individual* to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors....” 26 U.S.C. § 527(e)(2) (emphasis added).

The Supreme Court in *McConnell* recognized that section 527 groups are primarily engaged in influencing elections. It stated, “Section 527 ‘political organizations’ are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity.” 540 U.S. at 174 n.67. The Court noted that 527 groups “by definition engage in partisan political activity.” *Id.* at 177.

Thus, by definition, any entity that registers with the Internal Revenue Service as a “political organization” under section 527 is “organized and operated primarily” for the purpose of “influencing or attempting to influence the selection, nomination, election or appointment of” an individual to public office. The Commission has frequently cited the section 527 standard as identical to the “major purpose” prong of the test for “political committee” status. *See e.g.*, Ad. Ops. 1996–13, 1996–3, 1995–11. Accordingly, any group that chooses to register as a “political organization” under section 527 — including Unity 08 — is *by definition* an entity “the major purpose of which is the nomination or election of a candidate....”<sup>6</sup> Under the “major purpose” standard set forth in *Buckley*, this is sufficient to meet the first prong of the “political committee” test.<sup>7</sup>

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<sup>6</sup> This would be true in all instances other than a 527 organization which is devoted to influencing the nomination or appointment of individuals to appointive office such as, *e.g.*, a judicial appointment. But this exception does not apply to Unity 08. Of course, if the 527 group is involved only in influencing State and local candidate elections, it would not be a federal political committee because it would not meet the second prong of the test, *i.e.*, it would not be receiving federal “contributions” or making federal “expenditures.” In this case, however, Unity 08 indicates that *all* of its electoral activity will be directed to federal elections.

<sup>7</sup> Despite Unity 08’s repeated statements that it’s goal is to elect a Unity 08 Ticket for President and Vice President in 2008, and its declaration to the IRS that its primary purpose is “influencing or attempting to influence the selection, nomination, election or appointment of” an individual to public office, Unity 08 argues in “Point III” of its AOR Supplement that its “major purpose” is *not* “the nomination or election of a candidate.” Unity 08 does so by confusingly collapsing the “major purpose” test into the unrelated “clearly identified candidate” test used to determine whether particular funds received by an organization constitute “contributions” under FECA. *See* AOR Supplement at 17–22. Unity 08’s employment of the “clearly identified candidate” test in the context of disputing whether its “major purpose” is influencing federal elections is misplaced and redundant of its lengthy AOR Supplement “Point II” argument that is not receiving “contributions” or making “expenditures” under FECA. Rather than confuse the matter further, we instead discuss the “clearly identified candidate” standard below, in the context Unity 08’s fundraising.

**IV. Contrary to AOR Supplement “Point II,” Unity 08 is accepting “contributions” and making “expenditures” to influence the election of a “clearly identified Federal candidate.”**

Draft Ad. Op. 2006–20 correctly concludes that “Unity 08 will accept ‘contributions’ and make ‘expenditures’ as defined under the Act and FEC regulations.” Draft Ad. Op. 2006–20 at 3. The Draft Ad. Op. correctly relies on the Second Circuit Court of Appeals decision in *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995), Commission regulations (11 C.F.R. § 100.57) and past advisory opinions to conclude that funds received in response to solicitations indicating that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate constitute “contributions” under federal campaign finance law. Draft Ad. Op. 2006–20 at 4.

Further, Draft Ad. Op. 2006–20 correctly relies on Ad. Op. 2003–23 (WE LEAD) as establishing that the “clearly identified candidate” standard is satisfied when “candidates were identifiable as to specific office, party affiliation, and election cycle, although names of the eventual nominees were not known.” Draft Ad. Op. 2006–20 (quoting Ad. Op. 2003–23) (also citing Ad. Op. 1982–23 (Westchester Citizens for Good Government) and Ad. Op. 1977–16 (Iowa 1980 U.S. Senate Campaign Committee)).

Unity 08 disputes the OGC’s conclusions on three principal grounds. First, Unity 08 argues that the Second Circuit decision in *FEC v. Survival Education Fund* is inapplicable here, because the court based its decision on the fact that the Survival Education Fund’s solicitation left “no doubt that the funds contributed would be used to advocate President Reagan’s defeat at the polls.” AOR Supplement at 11 (quoting *FEC v. Survival Education Fund*, 65 F.3d at 295). However, the threat of corruption justifying the regulation of the Survival Education Fund existed with respect to the *unnamed* opponent of then-President Reagan, who would be the beneficiary of the Survival Education Fund’s spending. Despite the fact that the benefiting candidate was unnamed, such candidate was sufficiently “clearly identified” for the purposes of federal campaign finance law because the benefiting candidate was identifiable as to specific office, party affiliation, and election cycle. For this reason, the general counsel in his draft advisory opinion correctly relied on the Second Circuit decision in concluding that funds received by Unity 08 are “contributions” under FECA.

Second, Unity 08 argues that the Commission’s prior advisory opinions, Ad. Ops. 2003–23 (WE LEAD) and 1982–23 (Westchester Citizens for Good Government), should simply be ignored in this instance. Unity 08 argues that these advisory opinions are inconsistent with *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (*Machinists*), and *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996) (*GOPAC*). Because Unity 08 has not yet identified any specific candidate to support, it argues that it is not accepting “contributions” or making “expenditures” for purposes of the “political committee” test, and that it will not be doing so until it nominates actual candidates for President and Vice President.

Simply put, the D.C. Circuit decision in *Machinists* — one of the so-called “Draft Kennedy” cases — is not applicable here. In *Machinists*, the group at issue was engaged in “attempts to convince the voters — or Mr. Kennedy himself — that he would make a good

‘candidate,’ or should become a ‘candidate.’” *Machinists*, 655 F.2d at 396. There was no certainty, or even likelihood, that Kennedy would ever become a candidate within the meaning of FECA. Thus, the “draft” committees might in the end never support a “candidate” for federal office. For much the same reason, the district court decision in *GOPAC* is also plainly distinguishable. There, the group in question was supporting *state and local* candidates for the purpose of building a “farm team,” *id.* at 854, with the “*ultimate* major purpose” of electing Republicans to the House. *Id.* at 858 (emphasis in original). The district court stressed that *GOPAC* “avoided *directly* supporting federal candidates,” *id.* at 857 (emphasis in original), and “did not make any direct contribution to any particular federal candidates.” *Id.* at 858.

Here, by contrast to *Machinists* (uncertain candidacy) and *GOPAC* (nonfederal candidates), Unity 08’s stated principal goal is to nominate and support candidates for President and Vice President who will undoubtedly be on the ballot in at least some states in 2008. As explained in detail in our June 19, 2006 comments, the OGC correctly identified Ad. Op. 2003–23 (WE LEAD) as the mostly closely analogous precedent to guide the Commission’s determination regarding whether Unity 08 is raising funds to support a sufficiently “clearly identified” federal candidate. The Commission’s WE LEAD advisory opinion makes clear that the “clearly identified candidate” standard is satisfied even when there is not yet any named candidates, but when candidates-to-be-named are identifiable as to specific office, party affiliation, and election cycle. *See* Ad. Op. 2003–23; *see also* Ad. Op. 1982–23 (Westchester Citizens for Good Government) and Ad. Op. 1977–16 (Iowa 1980 U.S. Senate Campaign Committee).

Unity 08’s activity falls under the umbrella of the WE LEAD opinion, and not the *Machinists* situation. Unity 08’s activity relates not to an individual who may or may not become a federal candidate, but to an “as-yet unknown” party nominee who, by definition, will be a candidate. But although “as-yet unknown,” this “presumptive nominee” of the Unity 08 committee “is identifiable as to specific office” (President of the United States) as well as to “party affiliation” (the Unity 08 committee, once it endorses) and “election cycle” (2008). Just as these identifying attributes were sufficient in Ad. Op. 2003–23 to constitute a “clearly identified candidate” for purposes of the earmarking rules, so too they are sufficient here for purposes of determining that Unity 08’s fundraising and spending constitutes accepting “contributions” and making “expenditures.”

Third, with respect to Unity 08’s contention that it is not accepting “contributions” under FECA, Unity 08 points to a disclaimer it recently added to its Web site stating that money raised “will not be used to support or oppose any federal candidates, but will be used to support Unity 08’s organizational building efforts.” AOR Supplement at 13. This disclaimer is not only self-serving, but also self-contradictory, and in no way establishes that funds raised by the organization are not “contributions.” Indeed, funds spent by Unity 08 to build the organization are funds spent to support federal candidates — as supporting federal candidates is the organization’s primary goal.<sup>8</sup>

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<sup>8</sup> This self-contradictory claim calls to mind the so-called party building rationale underlying the soft money system outlawed by Congress through passage of the Bipartisan Campaign Reform Act of 2002 (BCRA). FECA definitions of “contribution” and “expenditure” contain no exception for “organization



Finally, the general counsel correctly concludes in Draft Ad. Op. 2006–20 that “amounts Unity 08 spends on expenses such as qualifying candidates for ballot positions through petition drives and holding an online nominating convention will be expenditures under the Act and Commission regulations.” Draft Ad. Op. 2006–20 at 6. Under FECA, any disbursements by Unity 08 “for the purpose of influencing any election for Federal office” constitute “expenditures. 2 U.S.C. § 431(9).

Unity 08 claims it is not making “expenditures” because it is not engaged in express advocacy and because it has not sufficiently identified the candidates it intends to support. But, again, the test of whether a group has made “expenditures” is not limited by the “express advocacy” standard when applied to a “major purpose” group, such as Unity 08; and an organization has “clearly identified” a candidate when such candidate is identifiable as to specific office, party affiliation, and election cycle. For these reasons, Unity 08’s argument that it is not making “expenditures” is at odds with Supreme Court precedent, federal statutes, Commission regulations and Commission advisory opinions.

## V. Conclusion

For the foregoing reasons and those articulated in our June 19, 2006 comments, the Commission should adopt the draft opinion, Agenda Doc. 06–50, recommended by the general counsel and advise Unity 08 that its activities relating to the 2008 presidential election require it to register as a “political committee” and to comply with the contribution limits, source prohibitions and reporting requirements of the law.

Respectfully,

*/s/ Fred Wertheimer*

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building” expenses — and for the Commission to create such an exemption here would be to unlawfully recreate the soft money system in the context of nonconnected committees.

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Copy to: Each Commissioner  
Commission Secretary